

The Honorable Thomas T. Glover  
Hearing Date: May 28, 2008  
Hearing Time: 9:30 a.m.  
Response Date: May 28, 2008  
Chapter 13

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UNITED STATES BANKRUPTCY COURT  
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

In re	)	
	)	Case No. 04-14958
Judy A. Harlock,	)	
	)	Adv. Proc. No. 08-01117
Debtor.	)	
	)	DEFENDANT EDUCATIONAL CREDIT
	)	MANAGEMENT CORPORATION'S
Judy A. Harlock,	)	OPPOSITION TO PLAINTIFF'S MOTION
	)	FOR PRELIMINARY INJUNCTION AND
Plaintiff,	)	NOTICE AND MOTION FOR SUMMARY
	)	JUDGMENT
v.	)	
	)	
Educational Credit Management Corporation,	)	
	)	
Defendant.	)	
	)	
	)	

DEFENDANT EDUCATIONAL CREDIT MANAGEMENT  
CORPORATION'S OPPOSITION TO PLAINTIFF'S MOTION FOR  
PRELIMINARY INJUNCTION AND NOTICE AND MOTION FOR  
SUMMARY JUDGMENT - 1

Case No. 04-14958 Adv. Proc. No. 08-01117  
#671218 v1 / 32859-120

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1 **NOTICE**

2 PLEASE TAKE NOTICE that DEFENDANT'S MOTION FOR SUMMARY  
3 JUDGMENT (on shortened time), is SET FOR HEARING as follows:

4 JUDGE: Honorable Thomas T. Glover

TIME: May 28, 2008

5 PLACE: Marysville Municipal Court  
6 1015 State Avenue  
7 Marysville, WA 98270

DATE: 9:30 a.m.

8 IF YOU OPPOSE the below stated Motion, you must file your written response with  
9 the court clerk, serve two copies on the Judge's chambers, and deliver a copy to the  
10 undersigned NOT LATER THAN the RESPONSE DEADLINE, which is May 28, 2008.

11 IF NO RESPONSE IS TIMELY FILED AND SERVED, the Court may, in its  
12 discretion, GRANT THE MOTION PRIOR TO THE HEARING WITHOUT FURTHER  
13 NOTICE, ENTER THE ORDER, and strike the hearing.

14 **MOTION**

15 **I. RELIEF REQUESTED**

16 Plaintiff Educational Credit Management Corporation ("ECMC") respectfully requests  
17 an order denying Plaintiff Judy A. Harlock's ("Plaintiff") motion for a preliminary injunction,  
18 and further for an order dismissing her claims alleged in her complaint against ECMC.

19 **II. STATEMENT OF FACTS**

20 On or about February 16, 1988, Plaintiff executed a Promissory Note (the "Note") for  
21 a Federal Consolidation loan (the "Loan") in the amount of \$11,049.74; the entire amount was  
22 disbursed on this Note. *Affidavit of Kerry Klisch, p. 4.* The lender was Sallie Mae. The  
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28 DEFENDANT EDUCATIONAL CREDIT MANAGEMENT  
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SUMMARY JUDGMENT - 2

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1 guarantor was Great Lakes Higher Education Corporation ("Great Lakes"). *Affidavit of Kerry*  
2 *Klisch, p. 4, Exhibit A.*

3 When Plaintiff failed to honor her repayment obligation to Sallie Mae, her account  
4 became severely delinquent. Sallie Mae sent a letter to the Plaintiff on February 9, 2003,  
5 telling her that her loan would default on March 11, 2003 if she did not send in payment  
6 immediately. *Affidavit of Kerry Klisch, p. 5, Exhibit H.* This letter also informed Plaintiff  
7 that, if she did default, her loan would be assigned to the agency that guaranteed her loan and  
8 that the guarantor may take legal action against her. *See Exhibit H.*

9 Plaintiff made no payment to Sallie Mae after receiving this letter and defaulted on her  
10 student loan debt. *Affidavit of Kerry Klisch, p. 6, Exhibit E.* When a borrower defaults under  
11 the terms of the Note, federal regulations require the lender to file a claim with the Note's  
12 guarantor. *Affidavit of Kerry Klisch, p. 7; See also 34 C.F.R. § 682.401(b)(17)(i)(B); 20*  
13 *U.S.C. § 1085(l)(1) (borrower is in default of terms of Note after failing to make payment for*  
14 *270 days).* Pursuant to federal regulations, Sallie Mae filed a claim for default under the  
15 Note's guaranty with the guarantor, and Great Lakes paid Sallie Mae's claim for default on  
16 September 22, 2003. *Affidavit of Kerry Klisch, p. 7, Exhibit E.* As of September 23, 2003,  
17 Great Lakes owned all right, title, and interest in the Loan.

18 On September 24, 2003, Great Lakes sent Plaintiff a letter notifying her that she had  
19 defaulted, that Great Lakes had paid off the lender, and had contracted with OSI, a collection  
20 agency, to collect on the Loan. *Affidavit of Kerry Klisch, p. 8, Exhibit E.* OSI began  
21 contacting and corresponding with Plaintiff on September 24, 2003. *Affidavit of Kerry Klisch,*

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DEFENDANT EDUCATIONAL CREDIT MANAGEMENT  
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SUMMARY JUDGMENT - 3

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1 p. 9, Exhibit B (OSI's Collection History report evidencing numerous contacts with Plaintiff  
2 regarding the default status of the Loan). In fact, Plaintiff herself contacted OSI on October 1,  
3 2003. *Affidavit of Kerry Klisch*, p. 9, Exhibit B-2. Moreover, on February 22, 2004, an OSI  
4 collector spoke in person with Plaintiff, told her that her loan was defaulted, and advised her  
5 that "there is a good possibility she will be garnished." Plaintiff replied: "That was fine."  
6 *Affidavit of Kerry Klisch*, p. 9, Exhibit B-6.

7  
8 On April 13, 2004, fourteen months *after* Plaintiff received a letter from Sallie Mae  
9 telling her that she had defaulted and that her loan would be assigned to the guarantor, and  
10 almost seven months *after* Great Lakes notified Plaintiff that her loans were defaulted and  
11 owned by Great Lakes and almost six months *after* Plaintiff's own actions evidence that she  
12 knew her loans were held by Great Lakes/OSI, Plaintiff filed a Chapter 13 bankruptcy.  
13 *Affidavit of Kerry Klisch*, p. 10, Exhibits B, D, G.

14  
15 By agreement, Great Lakes assigns its accounts that are in Chapter 13 bankruptcy to  
16 ECMC for handling. Thus, Great Lakes transferred all right, title, and interest in the Loan to  
17 ECMC on or about May 13, 2004. *Affidavit of Kerry Klisch*, p. 10, Exhibit C. (Letter of  
18 Assignment from Great Lakes to ECMC and the ECMC transfer manifest).

19  
20 On August 30, 2004, *before* Plaintiff filed a § 523(a)(8) adversary proceeding, ECMC  
21 filed a proof of claim ("POC") in the amount of \$34,527.13. *Affidavit of Kerry Klisch*, p. 11,  
22 Exhibit D (POC and Notice of Electronic Claims Filing). About two weeks later, on  
23 September 10, 2004, Plaintiff filed an adversary proceeding to determine dischargeability of  
24 the Loan. Despite knowing from Sallie Mae that her loans were assigned to the guarantor,  
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SUMMARY JUDGMENT - 4

Case No. 04-14958 Adv. Proc. No. 08-01117  
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1 knowing that Great Lakes owned her loan, having had numerous contacts with Great  
2 Lakes/OSI, and knowing that ECMC had received assignment of and had filed a proof of  
3 claim in her Chapter 13 case, Plaintiff named only **one** party as defendant in her Complaint:

4 **Sallie Mae, Inc.** *Affidavit of Kerry Klisch, p. 12.*  
5

6 When Plaintiff filed her adversary proceeding, she had specific knowledge that Sallie  
7 Mae had assigned her loans and did not own any right, title, or interest in Plaintiff's student  
8 loan debt **for almost a year and a half.** Moreover, Plaintiff had known for almost a year the  
9 identity of the entity that did own her student loan debt and, in fact, had had numerous direct  
10 contact with them. *See Exhibits B, D, G.*  
11

12 When Sallie Mae failed to answer the Complaint, the court granted Plaintiff's Motion  
13 for Default Judgment on October 18, 2004. When Plaintiff received her general chapter 13  
14 discharge on August 9, 2007, documenting that her estate was fully administered. Her case  
15 was closed on September 12, 2007.  
16

17 On November 27, 2007, ECMC's in house Senior Attorney, Julie Swedback, advised  
18 Plaintiff's former bankruptcy counsel Ron Bell (who had retired), through his law partner  
19 William Davis, that the default order against Sallie Mae had no legal effect on ECMC's  
20 interest because Plaintiff's loan had defaulted before her bankruptcy filing and had been  
21 owned by the guarantor before he filed the bankruptcy and the adversary proceeding.  
22 Therefore, he had not only sued the wrong party but also had sued a party who had not owned  
23 the loan for almost a year. Ms. Swedback offered to accept service of process of a new  
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CORPORATION'S OPPOSITION TO PLAINTIFF'S MOTION FOR  
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SUMMARY JUDGMENT - 5

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1 § 523(a)(8) adversary proceeding complaint naming ECMC or to discuss  
2 consolidation/rehabilitation options with him and/or his client. *See* Exhibit F.

3  
4 Ms. Swedback also presented Ms. Davis with a copy of a sample notice sent to debtors  
5 in default, including Plaintiff, which advised debtors who held the loans and that immediate  
6 repayment was required. The collection agency's servicing history evidences the fact that  
7 Plaintiff received this notice because she called the collection agency within a week of  
8 receiving the default letter from the guarantor.

9  
10 In November 2007, pursuant to its **nonbankruptcy, non title 11 authority**, ECMC  
11 initiated administrative wage garnishment proceedings against Plaintiff. 20 U.S.C.  
12 § 1095a(a); 34 C.F.R. § 682.410. ECMC also mailed Plaintiff notice of garnishment and  
13 informed her of her administrative relief available to her under the Higher Education Act. *See*  
14 Exhibit G.

15  
16 Instead of invoking administrative relief under the Higher Education Act, Plaintiff  
17 contacted ECMC and informed that she was not invoking her rights under the Higher  
18 Education Act because her loans were discharged. Then, Plaintiff retained her present  
19 attorney, Steven Hathaway, and moved to reopen her bankruptcy case and asked this Court  
20 for an order reinstating the automatic stay. On April 9, 2008, the Court denied Plaintiff's  
21 motion. Instead of simply filing a proper adversary proceeding against ECMC, which would  
22 have triggered release of the administrative garnishment order, debtor's counsel has again  
23 moved for an injunction seeking to use the bankruptcy code to enjoin ECMC's garnishment  
24 rights under a wholly unrelated, non-title 11 statute. More importantly, the "complaint" filed  
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27  
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1 against ECMC is not an undue hardship AP, as required by 11 U.S.C. § 523(a) but rather  
2 alleges that ECMC violated 11 U.S.C. § 524. Neither one of Plaintiff's claims merit legal  
3 relief from this Court.  
4

### 5 **III. STATEMENT OF ISSUES**

6 1. Does a bankruptcy court have subject matter jurisdiction to issue an order to  
7 enjoin a creditor's garnishment rights that arise under non-title 11 law?

8 2. Where a debtor has no likely chance to succeed on the legal merits of the  
9 underlying action and cannot show irreparable harm, should a bankruptcy court grant her  
10 motion for a temporary injunction?  
11

12 3. Is ECMC entitled to judgment as a matter of law on the debtor's complaint for  
13 violation of the discharge injunction, where the debtor defaulted on her student loan debt  
14 before she filed an adversary proceeding, knew that her loans were held by the guarantor—not  
15 the lender--before she filed bankruptcy, but nonetheless sued lender and obtained a default  
16 judgment against a party that held no right, title, or interest in the student loan debt?  
17

### 18 **IV. EVIDENCE RELIED UPON**

19 This brief in opposition to Plaintiff's Motion for a Temporary Injunction and ECMC's  
20 Motion for Summary Judgment is based upon the accompanying declaration of Kerry Klisch  
21 and the attached Exhibits A-H.  
22

### 23 **V. INTRODUCTION**

24 This is not a case about suretyship as it relates to the federal guaranteed student loan  
25 program. Nor is it a case about whether Plaintiff is entitled to an undue hardship discharge of  
26  
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1 her student loan debt. Rather this case is only about a Plaintiff who knowingly sued the  
2 wrong party, obtained a default judgment against the wrong party in interest, and now asks  
3 this Court to hold an unrelated, unnamed party in contempt for performing its statutory and  
4 regulatory obligations under non-title 11 law pursuant to the default judgment. Put another  
5 way, Plaintiff's action is analogous to the situation where a person, who owns a Ford Focus,  
6 sues General Motors for mechanical problems she has with her Ford Focus. Or it is like  
7 somebody who has a complaint against Pepsi but sues Coke.

9 Plaintiff knew and had known for over a year before she filed her adversary  
10 proceeding that Sallie Mae did not own her student loans. She had numerous conversations  
11 and correspondence with the guarantor and the collection agency, OSI, for over a year before  
12 she filed her adversary proceeding. Plaintiff's former attorney simply named the wrong party  
13 and obtained a default judgment against a party that owned no right, title, interest in the  
14 student loan debt. Such an order can have no legal effect against the proper, unnamed party in  
15 interest—and, more so, where the Plaintiff knew the identity of the proper party in interest  
16 before filing suit.

## 19 VI. ARGUMENT

20 **A. Because ECMC's garnishment authority derives from non title 11 law and**  
21 **because the relief Plaintiff seeks could have no conceivable effect on her Chapter**  
22 **13 bankruptcy estate, this Court lacks subject matter jurisdiction to grant**  
23 **Plaintiff's Motion for a Preliminary Injunction.**

24 The Bankruptcy Court lacks subject matter jurisdiction over a civil proceeding unless  
25 the action is "related to" bankruptcy, and only then if the proceeding would "conceivably  
26 have any effect on the estate being administered in bankruptcy." *In re Valdez Fisheries*

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1 *Development Ass'n v. State of Alaska*, 439 F.3d 545 (9<sup>th</sup> cir. 2005). In the case of Chapter 13  
2 estates, the 9<sup>th</sup> Circuit has held that no such related to jurisdiction exists if the Chapter 13 has  
3 been discharged. *In re Fietz*, 852 F.2d 455, 457 (9<sup>th</sup> Cir. 1988). Here, the debtor's Motion for  
4 a preliminary injunction suffers from two fatal flaws: (1) her Chapter 13 case has been  
5 discharged, and there is no estate left to administer, and (2) ECMC is garnishing her wages  
6 pursuant to the Higher Education Act, a non title 11 law. Therefore, her requested relief does  
7 not fall within this Court's "related to" jurisdiction.  
8

9 First, Plaintiff received her Chapter 13 general discharge on August 9, 2007. This  
10 documents that her estate was fully administered. Her case was closed on September 12,  
11 2007. Moreover, because Plaintiff is no longer submitting her wages to the Bankruptcy Court  
12 for the Trustee to administer, there is no estate to administer. *Id.* at 547.  
13

14 Second, ECMC's legally binding garnishment order was obtained under non-title 11  
15 law, the Higher Education Act, which provides federal guaranty agencies with the authority to  
16 administratively garnish the wages of borrowers who have defaulted on their federal student  
17 loan debt. 20 U.S.C. § 1095a(a); 34 C.F.R. § 682.410(b)(9). Pursuant to this authority,  
18 ECMC began garnishment proceedings in November 2007. Therefore, Plaintiff's motion is  
19 improperly asking the Court to prevent ECMC from acting upon its proper garnishment  
20 rights, rights that legally derive from non-title 11 law. And, even if ECMC's garnishment  
21 authority could be construed as relating to Plaintiff's bankruptcy, Plaintiff's requested relief  
22 could have no conceivable effect on the administration of her bankruptcy estate. *Id.* at 547-  
23 48. This Court lacks related to subject matter jurisdiction to grant Plaintiff's Motion.  
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28 DEFENDANT EDUCATIONAL CREDIT MANAGEMENT  
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1 **B. In addition to the jurisdictional infirmities, she is not entitled to injunctive relief**  
2 **because Plaintiff cannot show a “strong likelihood of success” on her underlying**  
3 **complaint.**

4 Although Plaintiff’s motion is jurisdictionally, fatally flawed, she has also failed to  
5 prove she is entitled to injunctive relief. While, it is not clear from Plaintiff’s motion for a  
6 preliminary injunction, which is not supported by any legal authority, the federal bankruptcy  
7 rules do authorize preliminary injunctions in adversary proceedings. Fed. R. Bankr. P. 7065  
8 (making Fed. R. Civ. P. 65, which governs preliminary injunctions, generally applicable in  
9 adversary proceedings). But, to prevail on a motion for a preliminary injunction, a plaintiff  
10 must typically show (1) a strong likelihood of success on the merits, (2) the possibility of  
11 irreparable injury to her if the preliminary injunction is not granted, and (3) a balance of  
12 hardships favoring the plaintiff. *See NRDC v. Winter*, 518 F.3d 658, 677 (9th Cir. 2008);  
13 *Alcove Inv., Inc. v. Conceicao (In re Conceicao)*, 331 B.R. 885, 889 (B.A.P. 9th Cir. 2005).  
14 In addition to a lack of jurisdiction, this Court must deny Plaintiff’s motion for a preliminary  
15 injunction should be denied because she cannot establish at least two of the three prongs  
16 required. Ultimately, whether the student loan repayment presents an undue hardship on  
17 Plaintiff is not properly before this Court, as Mr. Harlock’s complaint fails to cite § 523(a) as  
18 a basis for her motion. And importantly, because Plaintiff is improperly relying upon an  
19 unbinding order, the relief sought under the guise of a “contempt” allegation should be denied  
20 in full. Plaintiff is not legally entitled to an award of attorneys fees and costs in seeking to  
21 enforce the ineffective discharge judgment against ECMC. Nor has plaintiff cited legal  
22 authority that provides for such relief.  
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28 DEFENDANT EDUCATIONAL CREDIT MANAGEMENT  
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SUMMARY JUDGMENT - 10

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1           **1.       Plaintiff is unlikely to succeed on the merits of her claim.**

2           Plaintiff's default judgment has no legal effect against ECMC. Plaintiff's underlying  
3 complaint is founded on the premise that the order the Court entered in her Chapter 13  
4 bankruptcy on October 18, 2004, discharged her student loan debt. Plaintiff's argument is  
5 fatally flawed: she (knowingly) sued the wrong party. As analogized above, she may have  
6 had a claim against Ford Motor but sued and took a default judgment against General Motors.  
7 In short, Plaintiff, through her prior counsel, wrongly sued an entity that she knew did not  
8 hold her loans. Unfortunately, her new counsel is trying to improperly use the ill-conceived  
9 default judgment against the (unnamed) party who Plaintiff knew held her loans. Plaintiff has  
10 the burden to establish a legal basis for her complaint. No such basis has been cited, and, in  
11 fact, affidavits and servicing history on her loan supports ECMC motion for summary  
12 judgment as a matter of law.  
13

14  
15           As noted above, Plaintiff failed to make her loan payments to lender Sallie Mae and  
16 she defaulted under the terms of her student loan promissory note on or about September 22,  
17 2003. On September 24, 2003, the guarantor, Great Lakes (Great Lakes) sent Plaintiff a letter  
18 notifying her that she had defaulted, that GLEC had paid off the lender, and had contracted  
19 with OSI, a collection agency, to collect on the Loan. *See* Exhibit E. OSI began contacting  
20 and corresponding with Plaintiff on September 24, 2003. *See* Exhibit B (OSI's Collection  
21 History report evidencing numerous contacts with Plaintiff regarding the default status of the  
22 Loan). In fact, Plaintiff herself contacted OSI on October 1, 2003. *See* Exhibit B-2.  
23 Moreover, on February 22, 2004, an OSI collector spoke in person with Plaintiff, told her that  
24  
25  
26  
27

1 her loan was defaulted, and advised her that “there is a good possibility she will be  
2 garnished.” Plaintiff replied: “That was fine.” *See* Exhibit B-6.

3  
4 On April 13, 2004, almost seven months *after* Great Lakes notified Plaintiff that her  
5 loans were defaulted and owned by Great Lakes and almost six months *after* Plaintiff’s own  
6 actions evidence that she knew her loans were held by Great Lakes/OSI, Plaintiff filed a  
7 Chapter 13 bankruptcy. Great Lakes assigned Plaintiff’s account to ECMC after she filed her  
8 Chapter 13 bankruptcy case, and ECMC filed a proof of claim on August 30, 2004, which  
9 provided further notice to Plaintiff’s former attorney that an entity other than Sallie Mae held  
10 his client’s student loan debt. Nonetheless, Plaintiff’s former attorney filed an adversary  
11 proceeding on September 10, 2004. Despite knowing that Great Lakes owned her loan and  
12 despite having had numerous contacts with Great Lakes/OSI, and despite knowing that  
13 ECMC had received assignment of and had filed a proof of claim in her Chapter 13 case,  
14 Plaintiff named only one party as defendant in her Complaint: Sallie Mae, Inc.  
15  
16

17 When Plaintiff filed her adversary proceeding, Sallie Mae had not owned any right,  
18 title, or interest in Plaintiff’s student loan debt **for almost one year.** Moreover, Plaintiff had  
19 known that Sallie Mae no longer owned her loan for almost one year and had known for  
20 almost one year the identity of the entity that did own her student loan debt.  
21

22 After Plaintiff’s Chapter 13 had been fully administered and discharged, ECMC’s in  
23 house Senior Attorney, Julie Swedback, advised Plaintiff’s former bankruptcy counsel Ron  
24 Bell (who had retired), through his law partner William Davis, that the default order against  
25 Sallie Mae had no legal effect on ECMC’s interest because Plaintiff’s loan had defaulted  
26  
27

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1 before her bankruptcy filing and had been owned by the guarantor before he filed the  
2 bankruptcy and the adversary proceeding. Therefore, he had not only sued the wrong party  
3 but also had sued a party who had not owned the loan for almost a year. Ms. Swedback  
4 offered to accept service of process of a new § 523(a)(8) adversary proceeding complaint  
5 naming ECMC or to discuss consolidation/rehabilitation options with him and/or his client.  
6  
7 *See* Exhibit F.

8         There is no factual or legal basis Plaintiff can construct to make the default order  
9 entered against Sallie Mae, a party that she knew held no right, title, or interest in the student  
10 loan debt, applicable to ECMC. Therefore, in addition to the jurisdictional infirmities,  
11 Plaintiff be unable to show a “strong likelihood of success on the merits—indeed there is no  
12 likelihood of success—her motion for a preliminary injunction must be denied.”<sup>1</sup>  
13

14         Accordingly, Plaintiff is unlikely to succeed on the merits of her claim in this matter.  
15 For this reason alone, her motion for a preliminary injunction and requested contempt relief  
16 should be denied in full.  
17  
18  
19  
20

---

21 <sup>1</sup> At the April 9, 2008, hearing, ECMC erroneously argued there was a *Garmhausen/Wedell*  
22 issue at stake here. Because Plaintiff’s loans were defaulted before she filed her bankruptcy,  
23 *Garmhausen/Wedell* does not apply, i.e., Plaintiff knew that Sallie Mae had not held her loans  
24 for nearly a year before she filed her adversary proceeding. So the Court does not even need  
25 to go into a *Garmhausen* or surety analysis here. Plaintiff’s former attorney, Ron Bell’s  
26 adversary complaint was legally deficient at filing. Debtor’s present counsel cannot correct  
27 the deficiency or rely on the default judgment taken against Sallie Mae. To determine the  
28 dischargeability of Plaintiff’s student loan debt, he needs to properly file and serve ECMC  
with a summons and complaint under §523(a)(8).

1           **2.       Plaintiff will not suffer irreparable injury if the preliminary injunction is**  
2           **not granted.**

3           The second prong a plaintiff must establish in order for a motion for a preliminary  
4 injunction to be granted is that she will suffer irreparable injury absent the injunction. An  
5 irreparable injury is generally one for which a court could not compensate the moving party  
6 should she prevail in the final decree. *See Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d  
7 380, 386 (7th Cir. 1984). Accordingly, economic or monetary loss is not an irreparable injury  
8 because a party can be compensated for the loss. *See Nelson v. NASA*, 512 F.3d 1134, 1146  
9 (9th Cir. Cal. 2008); *Los Angeles Memorial Coliseum Com. v. National Football League*, 634  
10 F.2d 1197, 1202 (9th Cir. Cal. 1980).

11  
12           Plaintiff will not suffer irreparable injury if the preliminary injunction is not granted  
13 because her only potential injury is monetary. If the injunction Plaintiff seeks is not granted,  
14 ECMC will continue to garnish her wages in partial satisfaction of her student loan debt.  
15 Moreover, the Higher Education Act provides for administrative relief from wage  
16 garnishment actions, and Plaintiff should be required to exhaust those administrative  
17 remedies. 20 U.S.C. § 1095a; 34 C.F.R. § 682.410(b)(9). In the event Plaintiff is entitled to  
18 relief under the Higher Education Act, the appropriate court or agency could compensate any  
19 monetary injury.  
20  
21

22           Because Plaintiff's only potential injury in this matter is the monetary loss associated  
23 with garnishment of her wages, she has not sustained her burden of proving she will suffer  
24 irreparable injury if a preliminary injunction is not entered in this matter. Plaintiff therefore  
25 fails to prove she is entitled to injunctive relief, and her motion should be denied.  
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28 DEFENDANT EDUCATIONAL CREDIT MANAGEMENT  
CORPORATION'S OPPOSITION TO PLAINTIFF'S MOTION FOR  
PRELIMINARY INJUNCTION AND NOTICE AND MOTION FOR  
SUMMARY JUDGMENT - 14

Case No. 04-14958 Adv. Proc. No. 08-01117  
#671218 v1 / 32859-120

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1 **C. ECMC is Entitled to Summary Judgment Dismissing Plaintiff's Complaint for an**  
2 **Injunction and Contempt Remedies.**

3 Summary judgment is proper if "there is no genuine issue as to any material fact and  
4 .... the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *Surrell*  
5 *v. Cal. Water Serv.*, 518 F.3d 1097, 1103 (9th Cir. Cal. 2008). Conclusory statements without  
6 factual support are insufficient to defeat a motion for summary judgment. *Nat'l Steel Corp. v.*  
7 *Golden Eagles Ins. Corp.*, 121 F.3d 496, 502 (9th Cir. 1997).  
8

9 Here, as noted above, the default judgment issued against Sallie Mae has no legal  
10 effect or impact on ECMC. Plaintiff was well aware of the transfer of her loans from Sallie  
11 Mae to Great Lakes when she defaulted and had been aware of the transfer for almost a year  
12 before she filed her adversary proceeding against Sallie Mae. Neither Great Lakes nor ECMC  
13 was never named as a party, and Sallie Mae held no title or interest in her loans. The default  
14 judgment is therefore legally incompetent. Moreover, Plaintiff's complaint does not present  
15 any genuine issues of material fact, and ECMC is entitled to judgment as a matter of law with  
16 respect to her claims for injunctive relief and contempt remedies. ECMC's motion for  
17 summary judgment should therefore be granted.  
18  
19

20 **1. The Discharge Judgment Has no Legal Effect on ECMC.**

21 For the reasons stated above, the Court has no authority to uphold a default judgment  
22 issued against an entity that had no legal interest in the subject matter of the action as a means  
23 to extinguish a debt owed to an entity who held the debt when the adversary proceeding was  
24 filed. The same holds true for the requested contempt remedies sought – even if the Court  
25  
26  
27

28 DEFENDANT EDUCATIONAL CREDIT MANAGEMENT  
CORPORATION'S OPPOSITION TO PLAINTIFF'S MOTION FOR  
PRELIMINARY INJUNCTION AND NOTICE AND MOTION FOR  
SUMMARY JUDGMENT - 15

Case No. 04-14958 Adv. Proc. No. 08-01117  
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1 enjoins the valid garnishment order, there is no authority providing for attorneys fees and  
2 costs.

3 **2. Plaintiff's complaint does not present genuine issues of material fact.**

4 In essence, Plaintiff's complaint sets forth only two basic types of factual allegations,  
5 neither of which ECMC disputes. First, Plaintiff alleges that the Court entered an order in her  
6 bankruptcy action on October 18, 2004. While Plaintiff and ECMC disagree as to the legal  
7 effect of the Court's October 18, 2004, order, ECMC does not dispute the fact that such an  
8 order was entered. The parties' dispute as to the legal effect of the October 18 order,  
9 however, is not a genuine issue of material fact that renders summary judgment inappropriate  
10 in this matter. The October 18 order speaks for itself, and any dispute as to its legal effect is a  
11 question of law capable of adjudication on summary judgment. *See Fernandez v. GE Capital*  
12 *Mortg. Servs. (In re Fernandez)*, 227 B.R. 174, 179 (B.A.P. 9th Cir. 1998).

13 The only other factual allegations set forth in Plaintiff's complaint relate to ECMC's  
14 efforts to collect on the student loan debt it contends Plaintiff owes to ECMC,. ECMC does  
15 not dispute that it has attempted to collect on the student loan debt, including initiating  
16 garnishment proceedings against Plaintiff in November 2007. The only dispute in this matter  
17 is whether the Court's October 18 order discharged the student loan debt Plaintiff owes to  
18 ECMC. Again, the legal effect of the October 18 order is a question of law, as opposed to an  
19 issue of fact sufficient to defeat a summary judgment motion. *See id.* As noted above,  
20 Plaintiff's former attorney named the wrong party and Plaintiff has no legal ground to make  
21 that order binding on Great Lakes/ECMC.

22 DEFENDANT EDUCATIONAL CREDIT MANAGEMENT  
23 CORPORATION'S OPPOSITION TO PLAINTIFF'S MOTION FOR  
24 PRELIMINARY INJUNCTION AND NOTICE AND MOTION FOR  
25 SUMMARY JUDGMENT - 16

26 Case No. 04-14958 Adv. Proc. No. 08-01117  
27 #671218 v1 / 32859-120

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## VII. CONCLUSION

Plaintiff's motion for a preliminary injunction and requested contempt remedies should be denied because she is unlikely to ultimately succeed on the merits of her claim for a permanent injunction and she will not suffer irreparable harm absent the preliminary injunction she seeks.

Furthermore, the claims for relief Plaintiff sets forth in her complaint should be dismissed with prejudice on summary judgment. Plaintiff's complaint does not present any genuine issues of material fact, and ECMC is entitled to judgment as a matter of law. A proposed order is attached.

DATED this 22nd day of May, 2008.

KARR TUTTLE CAMPBELL, P.S.

By: /s/ Michaelanne Ehrenberg  
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Attorneys for Educational Credit  
Management Corporation